

Accordingly, the Board hereby REVERSES the initial decision issued July 16, 1981, and SUSTAINS the agency's removal of appellant effective February 28, 1981.

This is the final order of the Merit Systems Protection Board in this appeal. 5 C.F.R. § 1201.113(c).

The appellant is hereby notified of the right under 5 U.S.C. § 7703 to seek judicial review of the Board's action by filing a petition for review in the United States Court of Appeals for the Federal Circuit, 717 Madison Place, N.W., Washington, D.C. 20439. The petition for judicial review must be filed no later than thirty (30) days after the appellant's receipt of this order.

For the Board:

KATHY W. SEMONE
for ROBERT E. TAYLOR,
Secretary.

WASHINGTON, D.C., *January 19, 1983*

FRANK C. MALONE
v.
DEPARTMENT OF JUSTICE

DOCKET No.
DA03518210042

OPINION AND ORDER

Pursuant to a reduction-in-force (RIF) action allegedly taken because of budgetary constraints, appellant was assigned from the position of Correctional Officer, GS-9, to the position of Correctional Officer GS-7. Appellant, a retired military employee classified in subgroup I-B on the agency's retention register, was displaced (bumped) by a subgroup I-A employee. Appellant appealed to the Dallas Regional Office of the Board alleging various harmful procedural errors by the agency in his assignment and in his treatment as a retired military employee, discrimination based on race, and reprisal for having filed previous discrimination complaints. The presiding official, after determining that the RIF was conducted pursuant to law under *Losure v. Interstate Commerce Commission*, 2 MSPB 361 (1980), found that appellant failed to prove either harmful error by the agency or his affirmative defenses of discrimination and reprisal. Accordingly, he sustained the RIF action.

Appellant petitions for review alleging, *inter alia*, error by the presiding official in holding portions of the hearing off the record, in displaying bias in favor of the agency by improper treatment of a witness, and in refusing to call witnesses requested by appellant. Appellant also challenges the constitutionality of 5 U.S.C. § 3501 relating to veteran retention preference in government service.

Appellant contends that the presiding official engaged in off-record discussions which resulted in the omission of significant information from the hearing transcript. Appellant, however, has not stated the specific evidence omitted. Appellant merely states that the presiding official informed him that only evidence relating to the conduct of the RIF would be allowed at the hearing. We find no error by the presiding official in limiting the scope of the hearing to evidence relevant to the RIF action. *See* 5 C.F.R. § 1201.41(b)(3).

Appellant further alleges that the presiding official indicated that he would accept only evidence approved by the agency representative, an allegation the agency emphatically denies. Appellant's allegation is quite serious and cannot be lightly dismissed. It attacks the integrity of the presiding official upon whom the Board must rely to "conduct fair and impartial hearings." 5 C.F.R. § 1201.41(b). Thus, we have held that, "[i]n making a claim of bias or prejudice, [the appellant] must overcome a presumption of honesty and integrity which accompanies administrative adjudicators." *In re King*, 1 MSPB 144, 147 (1980); *See also Weaver v. Department of the Navy*, 2 MSPB 297, 300 (1980). Appellant has presented no evidence in support of his allegation. Therefore, appellant has failed to show bias by the presiding official in this respect.

Also, appellant has not established bias by the presiding official in his treatment of Dale Ashton, a witness at the hearing and an agency employee. Appellant alleges: "Mr. Carnes [presiding official] took my key witness [Mr. Ashton] and made him Technical Advisor for the Agency, and I had nothing to say, that was really justice." The record shows that Mr. Ashton was called by the agency and was cross-examined by appellant. There is no indication in the record that the presiding official exhibited bias or otherwise acted inappropriately in relation to Mr. Ashton's appearance as a witness. Therefore, we find appellant's allegation to be frivolous and without merit.¹ *See King, id.*; *Weaver, id.*

In regard to the presiding official's alleged refusal to allow the witnesses he requested, appellant has failed not only to show error by the presiding official but also to show harm to his substantive rights. Therefore, appellant has failed to prove reversible error by the presiding official. *See Karapinka v. Department of Energy*, 6 MSPB 114, 116 (1981).

¹ Moreover, the agency, not the Presiding Official, chose its technical advisor, who was the Personnel Officer at the facility at which appellant is employed. We find no impropriety in this regard.

As to appellant's challenge of the constitutionality of 5 U.S.C. § 3501, it is well settled that administrative agencies are without authority to determine the constitutionality of statutes. See *Montana Chapter of Association of Civilian Technicians, Inc. v. Young*, 514 F.2d 1165, 1167 (9th Cir. 1975). Thus, this issue is not within the Board's purview. Also, the Board has considered the other allegations raised by appellant and finds them without merit.

Accordingly, the petition for review is hereby DENIED.

This is the final order of the Merit Systems Protection Board in this appeal. The initial decision shall become final five (5) days from the date of this order. 5 C.F.R. § 1201.113(b).

The appellant has the right to petition the Equal Employment Opportunity Commission for consideration of the Board's final decision with respect to claims of prohibited discrimination under 5 U.S.C. § 7702(b)(1) within thirty (30) days after notice of the decision. If the appellant prefers not to pursue this avenue of further review, or if the appellant does pursue this avenue but the Commission declines consideration under 5 U.S.C. § 7702(b)(2), the appellant may seek judicial review of the Board's final decision under 5 U.S.C. § 7702(a)(3).

The appellant may then assert the discrimination claim raised in this appeal before a United States District Court under 5 U.S.C. § 7702(e)(3). In such an action involving a claim of discrimination based on race, color, religion, sex, national origin, or a handicapping condition, appellant has the right under 42 U.S.C. §§ 2000e-5(f)-(k), and 2000e-16, and 29 U.S.C. § 794a, to request the court to appoint a lawyer to represent him, and to request that prepayment of fees, costs, or security be waived. The civil action in the District Court must be filed not later than thirty (30) days after the appellant's receipt of this order.

Appellant is hereby notified of the right to seek judicial review of the Board's action, of matters other than those related to discrimination, by filing a petition for review in the United States Court of Appeals for the Federal Circuit, 717 Madison Place, N.W., Washington, D.C. 20439. The petition for judicial review must be filed no later than thirty (30) days after the appellant's receipt of this order.

For the Board:

KATHY W. SEMONE
for ROBERT E. TAYLOR,
Secretary.

WASHINGTON, D.C., January 19, 1983